

1 Honorable Ronald B. Leighton  
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1 the Court for an Order in Limine on the topics set forth below. This motion is to exclude any  
 2 and all reference, testimony, or admission of evidence as outlined below.  
 3

4 **1. DISCIPLINE RECORDS AND PERSONNEL FILES**

5 Defendants' personnel files contain investigations with largely unsubstantiated  
 6 incidents which are not relevant to the facts of this case and should therefore be excluded per  
 7 FRE 401, 402, 403, 404(b).

8 **a. FRE 401 & 402**

9 Prior internal affair investigations have no relevance to whether or not the alleged  
 10 excessive force occurred here. FRE 401, 402, 802. The Court should exclude any reference  
 11 to prior internal affair investigations of any named Defendant in this matter.

12 **b. FRE 403 & 404(b).**

13 This Court has discretion to exclude even relevant evidence where the probative value  
 14 is substantially outweighed by the prejudicial effect. FRE. § 403. In *Maddox v. City of Los*  
 15 *Angeles*, 792 F.2d 1408, 1417-1418 (9th Cir. 1986), the Ninth Circuit excluded a relevant  
 16 internal police investigation because the report was more prejudicial than probative. This  
 17 Court should exclude any internal investigations contained in the Defendants' personnel files  
 18 for similar reasons. The Maddox Court was particularly concerned that the jury might infer  
 19 the defendant was guilty of wrongdoing merely because the Department initiated an internal  
 20 affairs administrative proceeding. *See Maddox*, 792 F.2d at 1417-18. Despite the fact that  
 21 Sgt. Malidore has never had a substantiated complaint, there is a substantial risk that the jury  
 22 might similarly misuse this information by giving "unfair or undue weight to this evidence, or  
 23 [being] confused as to the relevance." *Id.*

Admitting into evidence other complaints of alleged misconduct contained in Defendants' personnel files can have no other effect than to attack their character and show they possess a propensity for committing bad acts. This is precisely the use that FRE 404(b) prohibits. Using these documents to show that a defendant is a "quarrelsome individual," or that a defendant "has a penchant to use more force than is reasonably necessary" violates Rule 404(b). Martin A. Schwartz, *Section 1983 Litigation: Federal Evidence* § 2.06 (4th ed. 2011 Supp.).

**c. FRE 802**

Lastly, the officer-generated incident reports contain hearsay within hearsay and should be excluded. FRE 802. Plaintiff has not named any of the witnesses involved in the internal affairs investigations and therefore any accusations or statements taken during those investigations are inadmissible hearsay.

## 2. PLAINTIFF'S TESTIMONY REGARDING HER INJURIES

Plaintiff has not named any medical doctors as witnesses in this matter. Any opinions that Plaintiff was injured as a direct result of Defendants' alleged use of excessive force must be excluded as there is no causal connection. Plaintiff is not a medical expert and may not offer any opinion(s) on causation. FRE 701-702.

Plaintiff may only testify as to what she personally felt and/or observed during the alleged use of excessive force by the officers. She may testify as to what her physical condition was before her arrest, however, she may not offer any opinions that as a result of the tasing or choking she: vomited, urinated, she died, lost consciousness, suffered chronic and ongoing numbness, or any other medical condition.

1           **3. LIMIT EXPERT TESTIMONY OF THOMAS BURWELL**2           **a. Testimony Should Be Limited to the Issue Before the Jury:**  
3           **Whether the Force Was Reasonable**

4           Plaintiff's expert, Thomas Burwell, is expected to present use of force testimony for  
5           Ms. Neidinger and render an opinion that the use of force in this case was unreasonable.  
6           Pontification or opinions outside the issue of whether the force was reasonable is irrelevant,  
7           unduly prejudicial, and not helpful to the trier of fact. FRE 401, 402, 702. The expert should  
8           not be allowed to testify to his other beliefs regarding the use of force including, but not  
9           limited to:

10           (a)    "[That] [t]o administer this type of force for no good reason (this type  
11           of pain) is considered Torture.  
12           (b)    "[It] is shocking to the conscious."  
13           (c)    That the use of force in this case was criminal conduct amounting to  
                 assault or battery.

14           The Defendants seek exclusion of any of the above phrases or conclusions that fall  
15           outside whether the use of force was reasonable.

16           **b. Testimony Regarding County Policy or Lack Thereof is Irrelevant**

17           Plaintiff's expert may try to testify to whether Pierce County had a policy or procedure in  
18           place to monitor the use of tasers, but such testimony is irrelevant. FRE 401, 402; *See Also*  
19           *Argument Infra* §4.

20           **4. INTERNAL POLICIES DO NOT CREATE DUTIES**

21           The County is no longer a named party in this matter. Dkt. 48 – Second Amended  
22           Complaint. Therefore, any evidence regarding County liability under *Monell*,<sup>1</sup> including  
23           policy and training, is irrelevant. FRE 401, 402. Further, the Supreme Court has rejected that  
24           compliance or noncompliance with a local policy or practice material to the question of  
25

<sup>1</sup> *Monell v. Dept. of Social Services*, 436 U.S. 658, 691 (1978).

1 whether a single act violated individual's constitutional rights when examining qualified  
2 immunity:

3 Moreover, police enforcement practices even if they could be practicably  
4 assessed by judge, vary from place to place and time to time. We cannot  
5 accept that this search and seizure protections of the Fourth Amendment are so  
variable and can be made to turn upon such trivialities.

6 *Whren v. United States*, 517 U.S. 806, 815.

7 The Plaintiff should not be allowed to suggest in any manner that policies create a  
8 legal duty or that any inconsistency with policies establish a constitutional violation.

9

10 **5. NO REFERENCE TO INSURANCE OR INDEMNIFICATION UNDER  
PIERCE COUNTY CODE**

11 Any mention of insurance, insurance coverage, insurance policy limits, or indemnification  
12 is excludable under FRE 411. Plaintiff should not seek to offer any testimony or evidence  
13 regarding insurance or indemnification of the individual Defendants under the Pierce County  
14 Code.

15 DATED this 27<sup>th</sup> day of August, 2012.

16  
17 MARK LINDQUIST  
Prosecuting Attorney

18 s/ MICHELLE LUNA-GREEN  
19 MICHELLE LUNA-GREEN  
20 State Bar Number 27088  
21 Pierce County Prosecutor / Civil  
22 955 Tacoma Avenue South, Suite 301  
Tacoma, WA 98402-2160  
Ph: 253-798-6380 / Fax: 253-798-6713  
E-mail: [mluna@co.pierce.wa.us](mailto:mluna@co.pierce.wa.us)

## **CERTIFICATE OF SERVICE**

On August 27, 2012, I hereby certify that I electronically filed the foregoing MOTIONS IN LIMINE with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- **Christopher Taylor:** taylor@ftlawps.com

s/ CHRISTINA M. SMITH  
CHRISTINA M. SMITH  
Legal Assistant  
Pierce County Prosecutor's Office  
Civil Division, Suite 301  
955 Tacoma Avenue South  
Tacoma, WA 98402-2160  
Ph: 253-798-7732 / Fax: 253-798-6713

## **CERTIFICATE OF COMPLIANCE WITH LCR 7(d)(4)**

I hereby certify that I have conferred with opposing counsel as to the foregoing Motions in Limine.

CERTIFIED this 27th day of August, 2012.

**MARK LINDQUIST**  
Prosecuting Attorney

s/ MICHELLE LUNA-GREEN  
MICHELLE LUNA-GREEN  
State Bar Number 27088  
Pierce County Prosecutor / Civil  
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